part Waterworks Co. v. *Potter*, 7 H. & N. 160; *Pennington* v. *Brinsop Hall Coal Co.*, L. R., 5 Ch. Div. 769.

The reason in one and all is the same, he must not allow such things to escape from his own control and premises to another's detriment. Whether positive negligence must be proved in any or all the above illustrations is immaterial upon the precise point we are now considering.

The true cause of action therefore in *Ballard* v. *Tomlinson*, is not exactly that the defendants contaminated underground percolating water, but that he allowed his impure sewage to escape from his premises to the plaintiff's, and the circumstance that it reached there by underground percolation instead of by a surface stream is quite immaterial. The mode of transmission is unimportant. In this view of the case the decision in *Ballard* v. *Tomlinson* is clearly right, and quite in harmony with well-established principles on both sides of the Atlantic.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Supreme Court of Texas.

THE "EXPRESS" PRINTING CO. *v.* JOHN H. COPELAND.

When one becomes a candidate for public office, conferred by popular election, he is considered as putting his character in issue, so far as respects his qualifications for the office. Whatever pertains to the qualifications of the candidate for the office sought is a legitimate subject for discussion and comment, but statements and comments made must be confined to the truth, or what, in good faith and upon probable cause, is believed to be true, and the matter must relate to the suitableness or unfitness of the candidate for the office.

If the matter published be true, and is justified by the occasion, the candidate cannot recover against the publisher. If the matter be not justified by the occasion, then, whether true or false, the publisher is not relieved from liability, because the party was a candidate for public office; though the matter may be justified by the occasion. If it be false, a right of action accrues against the publisher, to defeat which the burden would be on him to show that publication was made in good faith, in the honest belief of its truthfulness, and that there were just and reasonable grounds for entertaining that belief.

In suits for libel, when defendant has asserted several inconsistent pleas in his answer, *inter alia*, one justifying by asserting the truth of the alleged libellous matter, the failure to establish such plea is not to be taken as tending to establish malice, and to aggravate the injury done defendant.

APPEAL from Bexar County.

This suit was brought by appellee against appellant, alleging that on January 7th 1883, appellee was a candidate for mayor of the city of San Antonio, the election for which was had January 8th 1883; that appellant published in its newspaper, the "San Antonio Express," a false, wicked and malicious libel, with the intent, and for the purpose of injuring him, to wit:

"As Mr. Copeland is a candidate for mayor, and as that officer has the general management of our finances, it is a legitimate question for the people to ask how he has managed affairs of others heretofore placed in his hands. We know very little of such transactions, though the records show one case that may give some valuable hints to the voters. We will state the facts, allowing the reader to make his own comments: In 1881 T. P. Aplin died, and Mr. Copeland was appointed administrator of his little estate, the total valuation of which was $2579.90. The administration was closed November 23d, and the report shows a total expense of administering on the estate of $2579.90 to have been $882.28, and the administrator was allowed to retain the balance of the estate $1777.62, subject to the order and instruction of the heirs. What such retention cost the heirs we do not know, but from the charges for administration it was doubtless a pretty heavy one. The heirs, no doubt, were afraid to give any instructions through fear that the balance of the estate would not pay the fees accruing for the money left in the administrator's hands."

Appellant answered by general and special exceptions and general denial, and specially denied the meaning attributed to the statement of appellee, and also that appellant published the statement believing it to be true; that the facts were furnished by others, who assured the appellant of their truth, and that the same was published in good faith, without any malice or ill-will against appellee, and under the honest belief that it was matter that was proper to be made known in view of appellee's candidacy for the office of mayor.

A trial had December 24th 1883, resulted in a verdict and judgment for $2500, from which this appeal is prosecuted.

Simpson & James and *Shook & Dittmar*, for appellant.

J. H. McLeary, for appellee.

WATTS, J.—Elsewhere the rule seems well established that in this class of cases, where the defendant justifies by alleging the truth of the libellous matter, and fails to establish the truth of the plea, this may be considered as a circumstance tending to show malice. But our statute gives the defendant the right to plead in his answer, as many several matters, whether of law or fact, as he may deem necessary to his defence, and which are pertinent to his cause, pro-

vided that he shall file them all at the same time, and in the due order of pleading.

In *Fowler* v. *Davenport*, 21 Texas 633, in construing that provision of the statute, Justice ROBERTS remarks that "the general and absolute right here given to plead several matters is unlimited, if they are pertinent to the cause, filed all at the same time, and in the due order of pleading. There is no qualification or abridgment of this right in matters that are inconsistent. Such a qualification would destroy the right." The conclusion reached in that case was that one plea could not be used as evidence, or as an admission for the purpose of destroying another inconsistent plea contained in the same answer.

It would seem, therefore, that in this character of suits where the defendant has asserted several inconsistent pleas in the same answer, and among them one justifying, by asserting the truth of the supposed libellous matter, to permit that plea to be taken as a circumstance tending to establish malice, on the ground that the plea was not sustained by the evidence, when probable cause of the non-existence of malice has been asserted in the answer, and is pertinent to the cause, would, in the language of Justice Roberts, "destroy the right."

Here the court instructed the jury that appellant had pleaded the truth of the publication in justification, and if the truth of the publication had not been established by the evidence, then to consider the fact of its having been pleaded as a circumstance tending to show malice, and to aggravate the injury done to plaintiff. There exist two fatal objections to this instruction. First, there is no plea contained in the answer asserting the truth of the publication, as a defence: Townshend on Slander and Libel, sect. 357.

In the second place appellant had asserted by plea, that the publication was privileged, and made upon probable cause in good faith and without malice, so that in either view the charge is erroneous.

With respect to the question of privilege asserted by the answer, there is considerable confusion found in the adjudicated cases. Judge COOLEY, in his work on Torts, p. 217, says, "The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public is concerned. With this end in view, not only must

freedom of discussion be permitted, but there must be exemption afterwards from liability for any publication made in good faith, and in the belief of its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for public office, either to the electors, or to a board of officers having power of appointment."

It may be asserted as a sound principle, and one supported by authority, that when a person consents to become a candidate for public office conferred by a popular election, he should be considered as putting his character in issue, so far as respects his qualification for the office: *Com.* v. *Clap*, 4 Mass. 169; *Com.* v. *Odell*, 3 Pitts. (Pa.) 449; *Rearick* v. *Wilcox*, 10 West. Jur. 681; Odgers on Slander and Libel, sect. 236.

Whatever pertains to the qualification of the candidate for the office sought, is a legitimate subject for discussion and comment, provided such discussion and comment is not extended beyond the prescribed limit; that is, all statements and comments in this respect must be confined to the truth, or what in good faith and upon probable cause is believed to be true, and the matter must be pertinent to the issue; *i. e.*, it must relate to the suitableness or unfitness of the candidate for the office.

In our form of government, the supreme power is in the people; they create offices and select the officers. Then, in the exercise of this high and important power of selecting their agents to administer for them the offices of government, are the people to be denied the right of discussion and comment respecting the qualification, or want of qualification of those who, by consenting to become candidates, challenge the support of the people on the ground of their peculiar fitness for the office sought? Usually it is by such discussion and comment concerning the qualification of opposing candidates that the people obtain the requisite information to enable them intelligently to exercise the elective franchise. Any abridgment of this right of discussion and comment, beyond the limitations heretofore stated, it seems to us would be extremely unwise.

And in this respect the press occupies the same position, and should be included in the same category with the people. Public journals are supported by and are published with a view to the dissemination of useful knowledge among the people, and the comments

and discussions of these journals are entitled to the same privileges and subject to the same limitations respecting the qualifications and suitableness of candidates for office, as those of the people.

Chief Justice WILLIE, in *Belo & Co.* v. *Wren*, 5 Texas Law Review 153, truly remarked that every "facility should be allowed for the quick dissemination of useful facts, and the freedom of the press should not be restrained further than is absolutely necessary to protect private character from falsehood and slander."

It is implied by the rule announced by us that the matter published must be such as is justified by the occasion; that is, it must be such as would be appropriate for the electors to consider in making a selection for the office. Ordinarily that would be a question of fact, to be submitted to the jury by appropriate instructions.

Then, if the matter published is true, and such as is justified by the occasion, there could be no recovery by the candidate against the publisher. If the matter is not justified by the occasion, then the fact that the person against whom it was directed was at the time a candidate for office, would not exempt the publisher from liability, whether the matter published was true or false. And although the matter published might be justified by the occasion, still, if it was false, a right of action would accrue against the publisher to defeat which the burden would be upon him to show that the publication was made in good faith, in the honest belief of its truth, and besides that there were just and reasonable grounds for entertaining that belief.

While the rule here announced seems to be just to all, we are aware of the fact that it is not in accord with some, and perhaps a majority of the adjudicated cases in this country. In New York comments and discussions relating to public officers and candidates for official positions are placed upon the same footing as comments and discussions concerning the private character of other persons. The tendency in the English courts is more liberal in protecting the freedom of the press, and the holding there is in accord with the conclusions announced in this opinion, and which we believe to be well founded in reason, and not merely in accord with the spirit of constitutional liberty and free republican institutions.

Our conclusion is that the judgment ought to be reversed and the cause remanded. Reversed and remanded.

The authorities upon the important and interesting question discussed in the principal case are not so harmonious as could be wished. In New York the rule

upon the subject is most unsatisfactory, and it is in effect held by the courts of that state that there is no privilege whatever possessed by the elector in canvassing the character and qualifications of a candidate for his suffrage beyond that which is possessed in any other relation. In the case of *Lewis* v. *Few*, 5 Johns. 1, the chairman of a public meeting signed an address adopted by the meeting, condemning the conduct of the governor, Morgan Lewis, then a candidate for re-election, which among other things charged him with want of fidelity to his party, pursuing a system of family aggrandizement in his appointments, signing the charter of a bank, knowing that it had been procured by fraud, attempting to destroy the freedom of the press by vexatious prosecutions, &c. In an action against the chairman for the libel contained therein, no attempt was made to prove the truth of the charges, and it was held by the Supreme Court that the publication was not privileged. Mr. Justice THOMPSON, in delivering his opinion, among other things, used this language: "That electors should have a right to assemble and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinion to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct, specific and unfounded crimes. It would in my judgment be a monstrous doctrine to establish that when a man becomes a candidate for an elective office, he thereby gives to others a right to accuse him of any imaginable crimes with impunity. Candidates have rights as well as electors, and these rights and privileges must be so guarded and protected as to harmonize one with another. If one hundred or one thousand men, when assembled together, undertake to charge a man with specific crimes, I see no reason why it should be less criminal than if each one should do it individually at different times and places. All that is required, in the one case or the other, is not to transcend the bounds of truth."

A like doctrine was laid down in the case of *King* v. *Root*, 4 Wend. 113; s. c. 7 Cow. 613, which was an action by the lieutenant-governor, against the defendant for charging him with being intoxicated in the senate chamber as he was about to take his seat as presiding officer. The defendant upon the trial brought a number of witnesses who testified to the truth of the charge, which also appeared to have been published in the full belief of its truth; but the jury found against the defendant, and under an instruction that the only privilege the defendant had was simply to publish the truth and nothing more, found a large verdict for the plaintiff. The reader is referred for a full discussion of these cases to Judge Cooley's excellent work on Constitutional Limitations, page *435. See also *Curtis* v. *Mussey*, 6 Gray 261; *Aldrich* v. *Printing Co.*, 9 Minn. 133; *Hunt* v. *Bennett*, 4 E. D. Smith 647; s. c. 19 N. Y. 173. Note to *Munster* v. *Lamb*, 23 Am. L. Reg. (N. S.) 19; *State* v. *Balch*, 31 Kas. 465; *Briggs* v. *Garrett*, 41 Leg. Int. 14.

Without attempting any extended criticism of these cases, it may be remarked that the rule laid down therein affords no privilege whatever to the elector. The sentence first quoted taken alone would seem to concede some privilege to the elector; but taken in connection with what follows, it is deprived of all force. "There is nothing upon the record showing the least foundation or pretence for the charges. The accusation, then, being false, the *prima facie* presumption of law is that the publication was malicious; and the circumstances of the defendant being associated with others does not *per se* rebut this presumption."

It is to be observed that this is precisely the rule laid down by the books in actions for slander and libel, in cases

where there is no question of privilege involved.

The case of *Rearick* v. *Wilcox*, 81 Ill. 77, is similar in principle, in that it substantially negatives the privilege of publication; but it also discusses the measure of damages which was not passed upon in *Lewis* v. *Few*. In *Rearick* v. *Wilcox*, the plaintiff was a candidate for the office of police magistrate in the city of Quincy, and the publication complained of in substance charged dishonesty and corruption, and that, if elected, the candidate would improve "every opportunity for peculation that might by possibility attach to the office." No attempt was made upon the trial to establish the truth of these charges; and it was held proper to prove the facts and circumstances connected with the publication to show absence of malice in fact, and that such evidence was competent upon the question of exemplary damages, but not as affecting compensatory damages; that it was error to instruct the jury that they might in mitigation of damages consider the excitement of the election leading to the publication, or the fact that the article was published for the sole purpose of defeating the plaintiff's election; that the fact that the defendant, as the proprietor of a newspaper, was actuated by what he believed to be for the public good, could not be taken into consideration in mitigation of damages. In delivering the opinion of the court, CRAIG, J., said: "While the qualification and fitness of a candidate for office might properly be discussed with freedom by the press of the country, we are aware of no case that goes so far as to hold that the private character of a person, who is a candidate for office can be destroyed by the publication of a libelous article in a newspaper, notwithstanding the election may be attended with that excitement and feeling that not unfrequently enters into our elections."

Both this case and that of *Lewis* v. *Few*, make the gratuitous and unnecessary assumption than any other rule than that prevailing in cases where no privilege is claimed would "give to others a right to accuse him [the candidate] of any imaginable crimes, with impunity;" or that "the private character of a person who is a candidate for office can be destroyed by the publication of a libellous article," &c., which indeed would be "a monstrous doctrine." There would seem to be no great difficulty, however, in formulating a rule that will effectually protect the rights both of the public as represented by the electors, and the candidate, by simply shifting the burden of proof and making the case one of conditional privilege.

Another class of cases makes a distinction between comments on a man's public conduct or qualification for office, and upon his private character, the radical defect of which rule as is well observed by Judge Cooley in his work on Constitutional Limitations (p. *440) consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing his public conduct. See *Gathercole* v. *Miall*, 15 M. & W. 331; *Commonwealth* v. *Morris*, 1 Va. Cas. 176; *Commonwealth* v. *Odell*, 3 Pitts. 449; *Commonwealth* v. *Clap*, 4 Mass. 163: *Sweeney* v. *Baker*, 13 W. Va. 158.

In the case of *Sweeney* v. *Baker*, *supra*, the rule is laid down as follows: "The only limitation to the right of criticism of the *acts* or *conduct* of a candidate for an office in the gift of the people is that the criticism be *bona fide*. As this right of criticism is confined to the *acts* or *conduct* of such candidate, whenever the *facts* which constitute the act or conduct criticised, are not admitted, they must of course be proven. [It is to be observed that the truth is always a defence in a civil action for libel. Where then is the privilege?] But *as respects his* person there is no such large privilege of criticism though he be a candidate for such office. This large privilege of crit-

icism is confined to his *acts*. The publication of defamatory language affecting his moral character can never be justified on the ground that it was published as a criticism. His talents and qualifications, mentally and physically, for the office he asks at the hands of the people may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion of which the voters are the only judges; but no one has a right by a publication to impute to such a candidate falsely crimes, or publish allegations affecting his character falsely."

It is quite generally held that any false charge affecting the private character of a candidate for, or an incumbent of, an office is actionable. Thus, it has been held actionable falsely to charge an officer with having taken a bribe, or with corruption or want of integrity: *Hamilton* v. *Eno*, 81 N. Y. 116; *Wilson* v. *Nooman*, 35 Wis. 321; *Gove* v. *Blethen*, 21 Minn. 80; *Russell* v. *Anthony*, 21 Kan. 450; *Littlejohn* v. *Greeley*, 13 Abb. Pr. 41; *Dole* v. *Van Rensselaer*, 1 Johns. Cas. 330.

So, falsely to charge an officer with having been intoxicated while in the discharge of his duties: *King* v. *Root*, *supra*; *Gottbehuet* v. *Hubachek*, 36 Wis. 515.

So, falsely to charge a sealer of weights and measures with "tampering with" and "doctoring" such weights and measures, has been held actionable: *Eviston* v. *Cramer*, 47 Wis. 659.

So, falsely to charge a city physician with having caused the death of a patient by reckless treatment: *Foster* v. *Scripps*, 39 Mich. 376.

In *Mayrant* v. *Richardson*, 1 Nott & McC. 348, it was held that to address letters to the electors of a district charging a candidate for the office of member of Congress with having an impaired understanding and a mind weakened by disease was presenting the subject to the proper and legitimate tribunal to try the question, and was not actionable. In the case of *Spiering* v. *Andrae*, 18 Am. L. Reg. (N. S.) 186, however, the Supreme Court of Wisconsin criticise this case, and express the opinion that "the great preponderance of authority is that words charging an officer with gross ignorance and incapacity are actionable *per se*. In this case it was held actionable *per se*, to say of a justice of the peace, that he, the defendant, did not want to sit as a juror before such a d —— d fool of a justice." It is worthy of remark that no attempt was made to prove the truth of the charge. This case as well as some of the preceding ones can be well distinguished from *Mayrant* v. *Richardson*, in that no question of privilege was raised in the case.

The case of *Mott* v. *Dawson*, 46 Ia. 533, seems to lay down a much more rational principle than any of the foregoing cases yet commented upon, excepting the principal case, and perhaps *Mayrant* v. *Richardson*, which latter so far as it goes, seems open to no criticism. In *Mott* v. *Dawson*, the court quote with approval Townshend on Slander and Libel, sect. 241, that "every one who believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right in good faith to communicate such his belief to that other;" and accordingly held that where one in good faith and without malice, makes a charge affecting the character of another, who is a candidate for office, to an elector, shortly before the election, he is not liable to an action therefor, his statement being in the nature of a privileged communication. The charge in this case was of having cheated upon the sale of cattle, and directly affected the moral character of the candidate.

The case of *Briggs* v. *Garrett*, Court of Common Pleas Philadelphia, 41 Leg. Int. 14, though a *nisi prius* case, is one of great interest in this connection, hold-

ing substantially the doctrine laid down in the preceding case of *Mott* v. *Dawson*. See also *State* v. *Balch*, 31 Kans. 465, which, though a criminal prosecution, may be read with profit in this connection.

With reference to the principal case, we are glad to be able to say that it has our unqualified approval. In our opinion in adopting the quotation from page 217 of Cooley on Torts, as the rule of decision, carefully limited as it is in the subsequent portions of the opinion, the learned judge who rendered the judgment of the court has placed his decision upon the solid basis of principle, and has established a precedent that ought to commend itself to every court called to pass upon similar questions in the future.

MARSHALL D. EWELL.

Chicago.

Supreme Court of New York.

FAIRLEE *v.* BLOOMINGDALE ET AL.

Under a statute empowering a married woman to carry on any trade or business on her sole and separate account, she is not authorized to enter into business in partnership with her husband, and the obligations of such a firm cannot be enforced against her.

MOTION for new trial.

Hiller & Krom, for the plaintiff.

Stevens & Mayhew, for defendants.

The opinion of the court was delivered by

WESTBROOK, J.—This cause was tried at the Schoharie Circuit in October 1883. The action was on a promissory note dated April 1st 1876, by which the defendants, who were, at the date of execution of the note, husband and wife, promised to pay "Elizabeth Fairlee (the plaintiff), or bearer, two thousand dollars, with interest, for value received." The note was signed "P. Bloomingdale," "F. M. Bloomingdale," and contained no clause charging the separate estate of the wife, who alone defended.

According to the testimony of the plaintiff, the consideration of this note was an old note, made by the same parties, for $1300, and $700 cash. She further testified that the wife, at the time the money was loaned and the note in suit given, stated they needed the money for goods, that she would see it paid, that she was as much interested in the business as her husband, and that the money was loaned by the plaintiff on the faith of such statement. She further said that the first note was executed by both defendants, that it was also for borrowed money, and that such first loan was upon a statement by the wife to the same effect as to her interest in the business with the one made by her when the note in suit was given.